

ADR & Technology: Introduction to the Cutting Edge

Sponsors:

- The ABA Public Contract Law Section Alternative Dispute Resolution Committee
- The ABA Dispute Resolution Section Public Contracts Committee
- The ABA Committee on Continuing Education of the Bar
- The Interagency ADR Working Group Contracts and Procurement Section

Overview

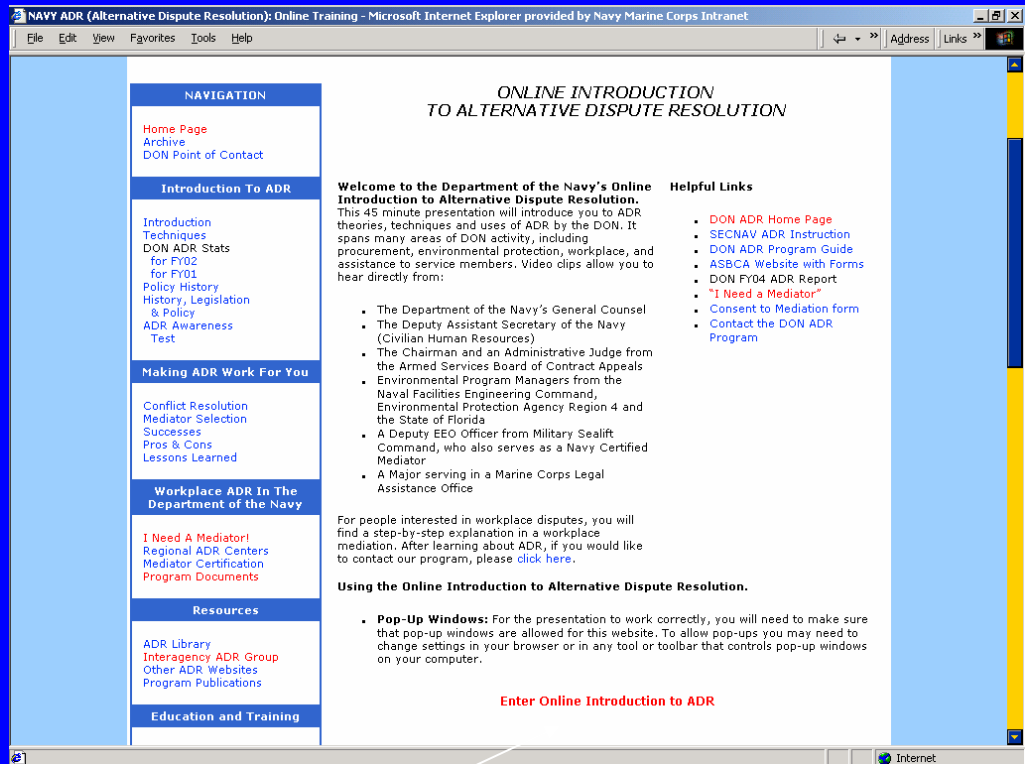
- Setting the Stage - Getting to the techno- ADR
- Cheap-Tech for Hearings
- Video Teleconferencing ADR
- Online Dispute Resolution at NMB

Overview (cont.)

- Most forms of ADR alter either the decision making process, or the information exchange process.
- Technologies mostly improve the information exchange process.
- All presentations focus on overcoming barriers by communication such as:
 - Explaining ADR to clients
 - Compressing a weeks trial into a few days.
 - Overcoming distance

Setting the Stage: ADR & Clients

- Clients need to understand the ADR process.
- For DON personnel and contractors, we have e-learning at:
adr.navy.mil/etraining.asp
- It is a public site



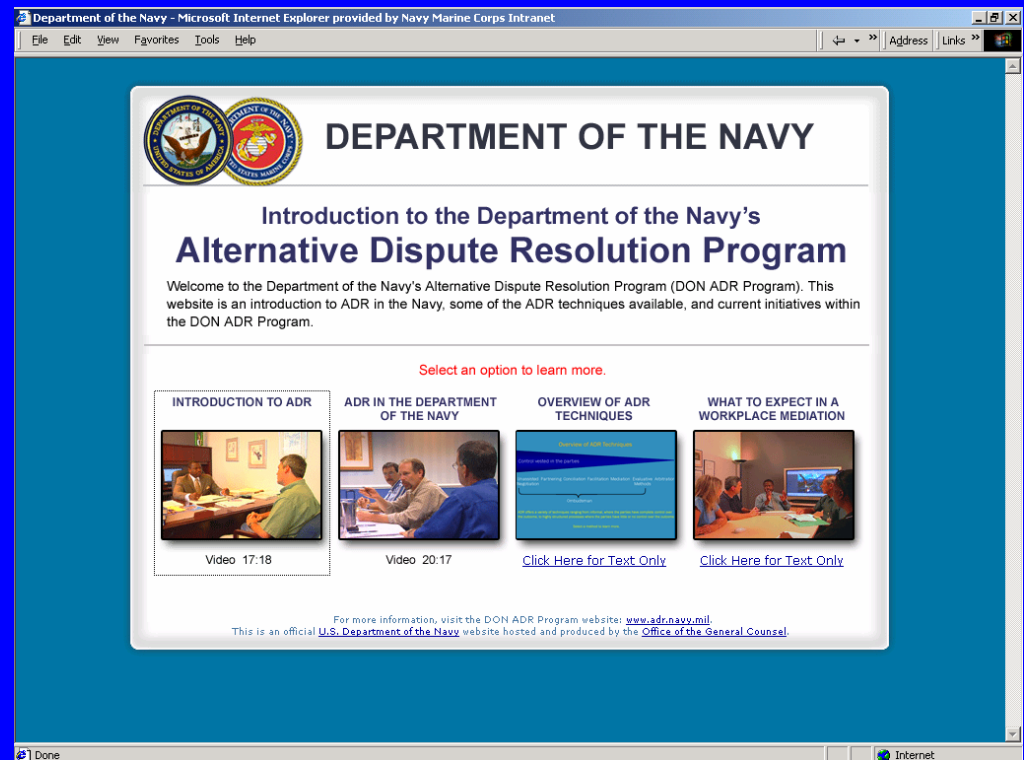
Launch from here down here

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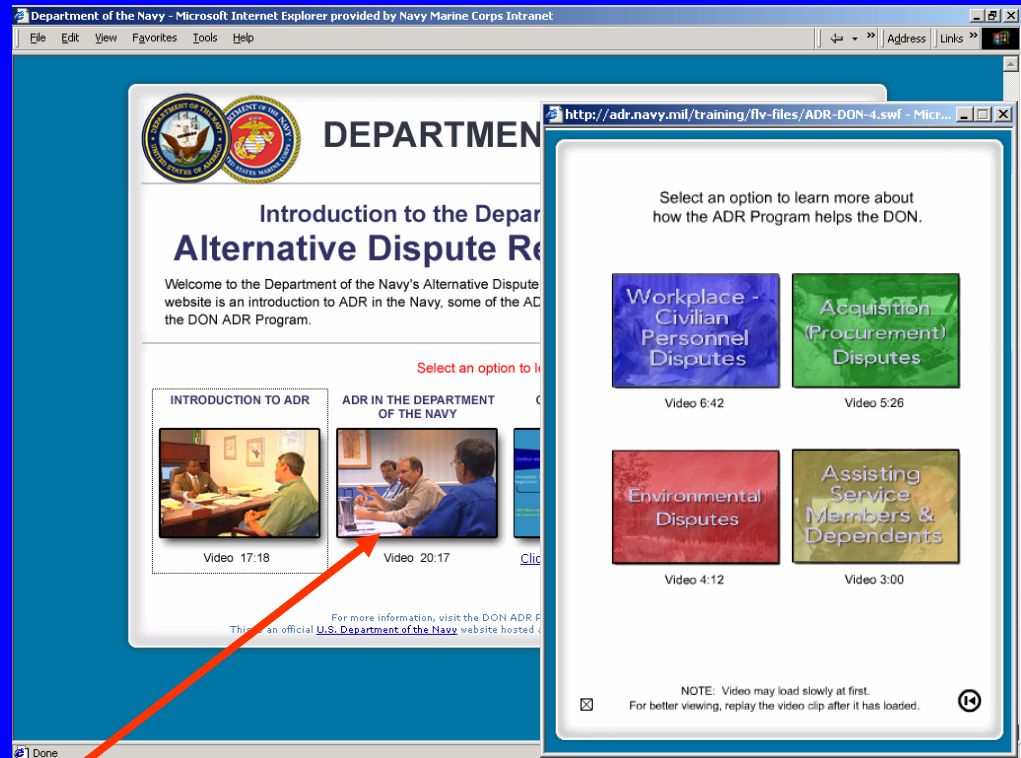


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Click here to get a brief intro, followed by specific areas, including acquisition.

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The screenshot shows a web browser window with the address bar displaying <http://adr.navy.mil/training/flv-files/ADR-DON-4.swf>. The main content area has a white background with a blue border. At the top, it says "Select an option to learn more about how the ADR Program helps the DON." Below this are four colored squares, each representing a video topic:

- Workplace - Civilian Personnel Disputes** (Blue square): Video 6:42
- Acquisition (Procurement) Disputes** (Green square): Video 5:26
- Environmental Disputes** (Red square): Video 4:12
- Assisting Service Members & Dependents** (Yellow square): Video 3:00

At the bottom, there is a note: "NOTE: Video may load slowly at first. For better viewing, replay the video clip after it has loaded." There are also icons for a close button (X) and a refresh button (circular arrow).

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Setting the Stage: The ADR Agreement

- ADR Agreements frequently have document exchange clauses.
- Consider in advance how you will treat PowerPoint and other unique tools used in an ADR proceeding.
 - Avoid charges of surprise in non-binding mediations (*remember the idea is to convince the others to settle!*)
 - For summary trial w/ binding decision, what will be in the record?
 - Should they be part of an expert's report?
 - Should graphs, images, etc. be limited to documents previously exchanged?

Setting the Stage: ADR Agreement

For example, ASBCA “settlement judge” form has the following statement:

5. Agenda. The presentations of the parties will be informal and the rules of evidence are waived. The settlement judge may, nonetheless, guide the presentation of evidence. [The parties should spell out how they wish to make their informal presentations and agree on time to be allotted to various phases of the process.]

Setting the Stage: ADR Agreement

Consider, therefore:

5. Agenda. *The presentations of the parties will be informal and the rules of evidence are waived. The settlement judge may, nonetheless, guide the presentation of evidence. **The parties anticipate using PowerPoint presentations during the proceeding. Such presentations shall not be considered part of the record, and do not need to be exchanged in advance of the mediation.]***

Setting the Stage: Damages

- “You should use some objective, systematic method of valuing a case and of determining the opening and bottom line positions.”

J.W. Cooley, *Mediation Advocacy*, p. 72 (1996)

- Reduce your systemic method to a spreadsheet format.
- Ideally, you should tie the spreadsheet into your entitlement and quantum themes.
- As negotiations advance, you can recalculate your position rapidly. (See example on next page.)

HOME OFFICE OVERHEAD CLAIM OF XYZ, Inc.

Delay Tasks

Days of Compensable Delay

Trench Digging Change	7
Pipe Specification Change	8
Inspection	0
Backfill	10
Inspection	0

Total Days	25
------------	----

Home Office Overhead

Total Contract Billings	\$ 2,800,000.00
Total Company Billings	\$ 10,000,000.00

Total Home Office Overhead	\$ 200,000.00
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This Project's Allocation	\$ 56,000.00
---------------------------	--------------

Total Days of Performance	260
---------------------------	-----

Daily Allocable Overhead Rate	\$ 215.38
-------------------------------	-----------

# of Compensable Delay Days	25
-----------------------------	----

Home Office Overhead Damages	\$ 5,384.62
------------------------------	-------------

Value With Interest Since CDA Certification

Total Simple Interest Per \$1 Claimed	\$ 0.16
Total Home Office Overhead Damages	\$ 5,384.62
Total Interest on Adjusted Claim	\$ 861.54

	\$ 6,246.15
--	-------------

An Example

Using PowerPoint and Trial Director
in High-Dollar Procurement
Mediation

Overview

- Contract Dispute
 - ADR
- Situation
- Solution
- Observations

The Contract

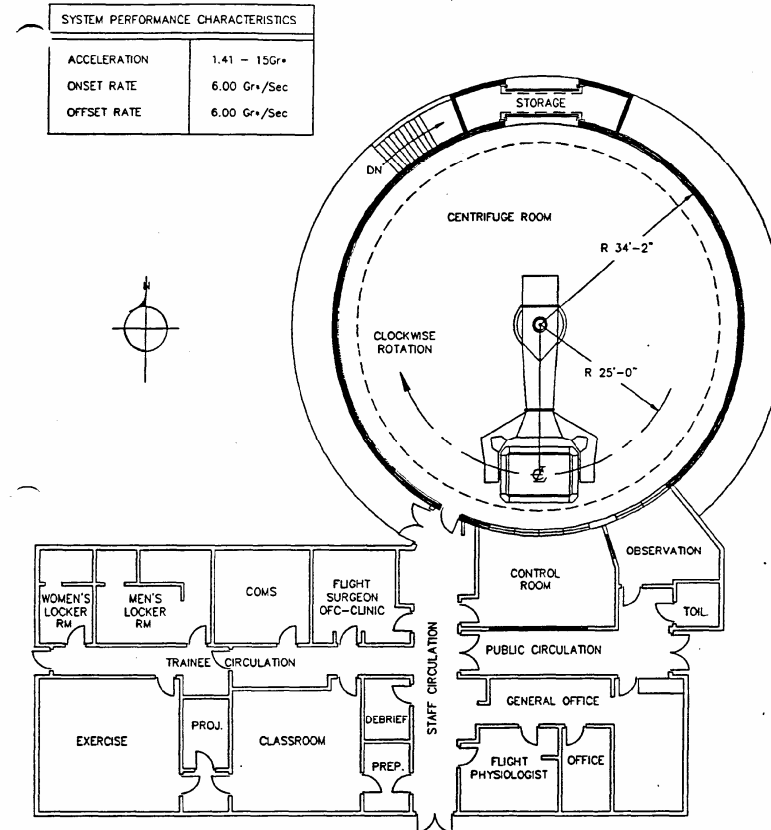
- Firm Fixed Price
- \$9,343,048
- Turnkey
- 1990 – 1996
- Protest

Contract for what?

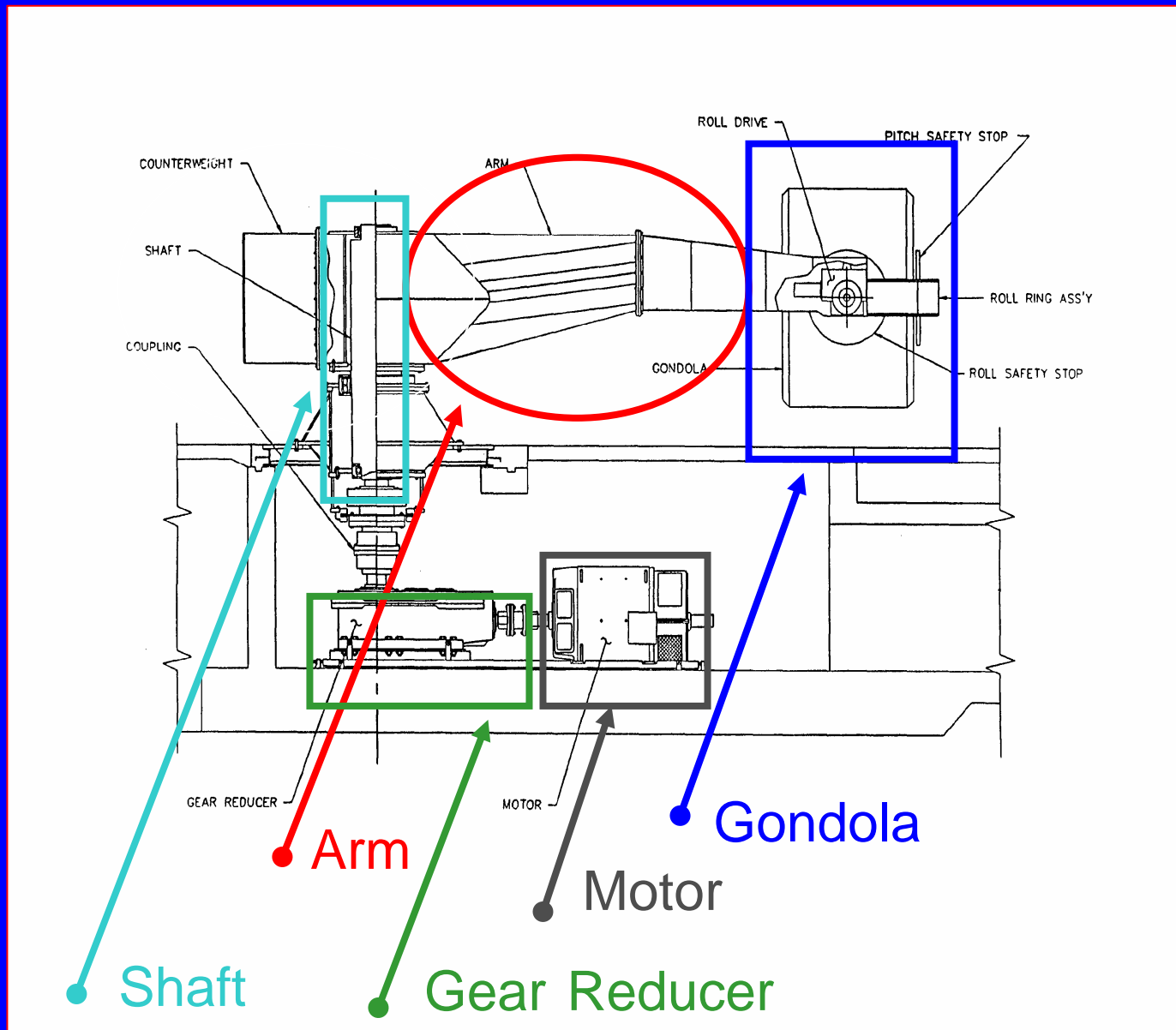
- Human Centrifuge

CFET

Centrifuge-Based Environmental
Trainer



CFET Centrifuge Device



The Claims

- \$12,000,000
- 60 sub-items
- Massive Document Collection
- Years of litigation
- Every Government Contract Issue

The Other Cases

- Contractor vs. Subcontractor
 - Construction – Miller Act Arbitration
 - Software - Arbitration

Natural Frequency



The Client's Desires

- End this mess
- Does not have the money

Draft ADR Agreement

- Evidence
- Cross-examine
- Rejected

Revised ADR Agreement

- Presentation
 - 3-days each
- Panel of three
- Judgment Fund

What Now?

- Massive record
- Complex issues
- Multiple Players
- Days vs. weeks/months

Pre-Trial Brief

- Drafting
 - Findings of fact
 - Legal Argument
- 850 pages
- Linked

Contractor Brief

- Less than 50 pages
- No electronic documents
 - 40 loose-leaf note books

Presentation I

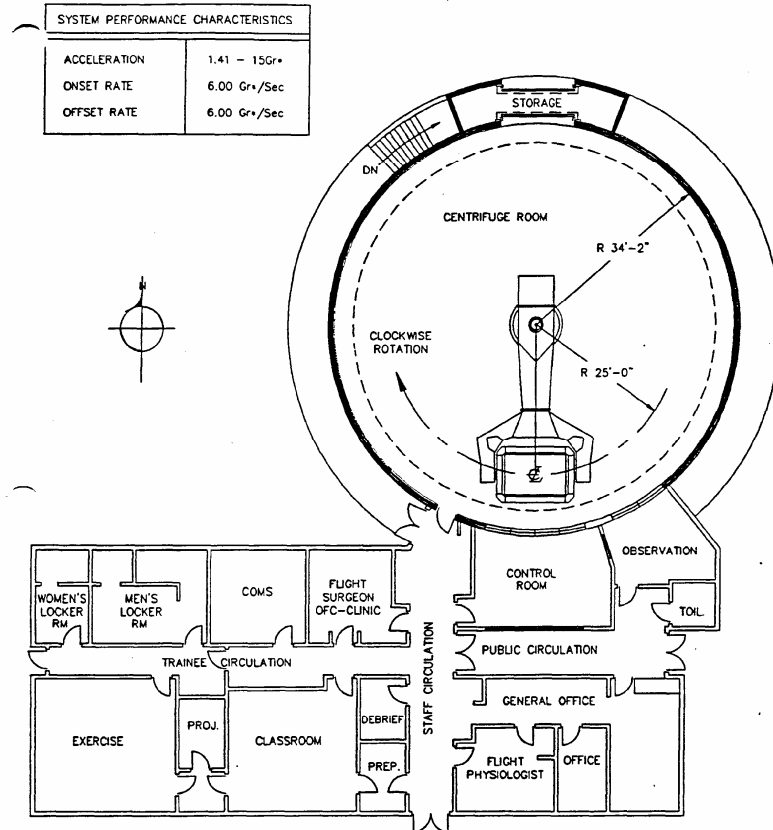
- We can do what we want!
- Good-bye
 - Evidence
 - Authenticity
 - Relevance

Presentation II

- Opening Statement
- Lay out the case.
 - Include legal argument
- One hour planned
- Ran three hours
- Interaction

Presentation III

- Screens Side by Side
 - Trial Director
- Quotes and Images



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Figure 3
Support Facility - Lemoore

101170

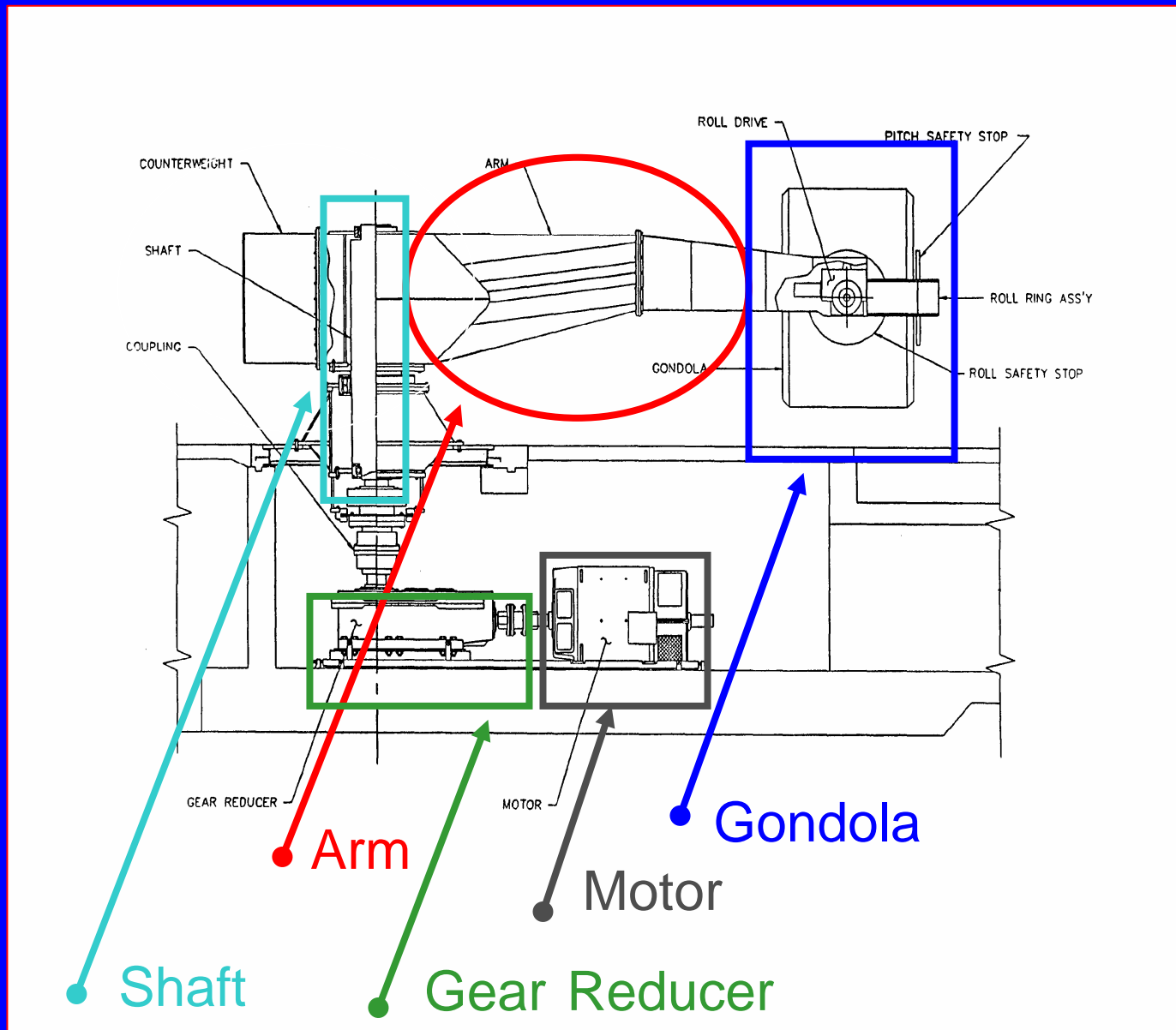
18

N029465

Example:

*Incorporating
an image of the
document into
the slide.*

CFET Centrifuge Device



Mr. Engineer – Finding 24

- Mr. Engineer ...testified: "Everything has a natural frequency. If you happen to excite that thing at its natural frequency, it starts resonating." **Engineer Deposition at Volume 1, pg. 52:18-20.**
- Put another way, Mr. Engineer testified: "If a system has a natural frequency, and you try to excite it from outside with the same frequency, then it resonates." **Engineer Deposition at Volume 1, pg. 138:8-10.**

Government Position

- Plain Meaning
- Contemporaneous Actions
 - Proposal
 - Pre-dispute Actions

Contract Specification

- 3.2.1.1.2.4.2. Arm Natural Frequency.

“The support arm shall be designed such that the lowest natural frequency in the vertical, onset/offset horizontal (torque), and radial directions shall be above 10.0 cycles per second. The complete centrifuge system, including foundation, drive, support structure, arm, gondola and moving accessories shall exhibit no resonance at frequencies below 10.0 cycles per second.”

2.3.2 Direction of Rotation. The centrifuge shall rotate in a clockwise direction when viewed from above.

2.3.3 Centrifuge Balancing. The centrifuge shall be designed such that the arm assembly is balanced for a given gondola payload at the arm angular velocity which results in 9.0 Gz (GCS), measured at the intersection of the gondola axes of rotation. The centrifuge design shall also accommodate the out of balance forces generated during all other accelerations. If a counterweight is used, it shall be adjusted by a mechanism capable of control from the remote engineering station within the control room. The contractor shall detail the balancing requirements for payloads between minimum and maximum.

2.3.4 Arm Support. The arm assembly shall be supported on a pedestal which shall be mounted to the foundations. Appropriate structure shall be provided to adequately withstand the weights and cyclical forces generated by the centrifuge.

2.3.5 Lock-up Safety System. In the event of a "lock-up" of the drive system, a safety feature shall be provided so that the subject is not subjected to a peak acceleration of more than $10G \times s^{-1}$ (SCS) for more than 0.10 seconds.

2.3.10 Natural Frequency. The support arm complete with gondola and nominal payload shall be designed such that the lowest natural frequency in the vertical, horizontal and radial directions shall be no less than 10Hz. With maximum payload the natural frequency shall be no less than

use by the operator. The operator shall be provided with a facility to operate the centrifuge arm to stop it at any position within the centrifuge chamber, for maintenance or other purposes.

2.3.8 Safety systems/interlocks. A system shall be provided which prevents operation of the centrifuge if all access to the centrifuge chamber is not closed and secure, or if gondola access is not closed and secure. Centrifuge operation shall also be prevented if other parameters, to be specified by the contractor, are outside limits.

2.3.9 Critical Component monitoring. The centrifuge system design shall include a means of monitoring the structural integrity and normal function of critical centrifuge components to be specified by the contractor, so that potential failures can be anticipated and prevented by automatic application of the emergency stopping sequence (Para 2.6.4).

2.3.10 Natural Frequency. The support arm complete with gondola and nominal payload shall be designed such that the lowest natural frequency in the vertical, horizontal and radial directions shall be no less than 10Hz. With maximum payload the natural frequency shall be no less than

Sub Suspends Work

- June 10, 1992
- August 7, 1992
- 58 days
- Prime directs
- Finding 308 – 325

Prime vs. Sub

- Navy not a party
 - Finding 385
 - April 1993
- Prime demands arbitration
 - Finding 386

Prime vs. Sub

- Prime demands arbitration
 - Finding 389
 - May 1993
- Prime seeks injunction
 - Finding 387
 - May 1993

Prime Starts Over

- Finding 391
- June 8, 1993
- Prime starts to develop ADA
- Within scope of basic contract

Termination

- Finding 398
- August 2, 1993
- Prime terminates sub for default

Unabsorbed Overhead

- Precipitating Event
- Overall Contract Delay

Unabsorbed Overhead

- Whose fault is it?
 - Excusable Delay
 - Compensable Delay
 - No contractor responsible delay
 - No concurrent delay

Legal Elements

Unabsorbed Overhead

- In addition to compensable delay
 - Suspension
 - Or substantial diminishment
 - Stand-by

Unabsorbed Overhead

- Eichleay Formula “is the only proper method of calculating unabsorbed home office overhead. No other formula may be used.”
 - *Wickham Contracting Co., Inc. v. Fischer*,
 - 12 F.3d 1547, 1575 (Fed. Cir. 1994)

Unabsorbed Overhead

- “Alternatives to Eichleay Disapproved”
 - *Wickham Contracting Co., Inc. v. Fischer*,
 - 12 F.3d 1547, 1579 - 80 (Fed. Cir. 1994)

Results

- Settlement
- Judgment Fund Paid
- Client was happy

Observations

- Technology Enhances
- Methods of Persuasion
 - Remain
- Not everyone wants to play
- Do your homework
- Rehearse